United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1446

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1446

B
P/S

UNITED STATES OF AMERICA,

Appellant,

-against-

BERNHARD FEIN,

Appellee.

BRIEF FOR APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

UNITED STATES COURT OF APPEALS
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BRIEF FOR APPELLEE

STATEMENT OF THE CASE

The United States District Court for the Eastern District of New York (Dooling, J.) dismissed the indictment against the defendant-appellee Fein. The Court thereafter denied a motion for reargument. The government has appealed. 1/

The District Court so ruled on the ground that the defendant was indicted after the lawful life of the grand jury had expired. The Court found that the grand jury had been convened

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1/ The opinions of the District Court are reported at 370 F. Supp. 466 and are set forth in the Government's Appendix (hereafter "Govt. App.") at pp.62-69 and 71-72.

pursuant to Rule 6(a) and (g) of the Federal Rules of Criminal Procedure and therefore its term was limited to eighteen months. The indictment was returned more than eighteen months after the grand jury had been convened.

The Court rejected the government's argument that an order signed by Chief Judge Mishler in the eighteenth month of the grand jury's tenure lawfully extended the grand jury's life. That order recites as its authority Title I of the Organized Crime Control Act of 1970, 18 U.S.C. § 3331, et. seq. The District Court found it unnecessary to reach the question of whether § 3331 provides authority for the extension of a grand jury convened under Rule 6(a) and (g). Rather, the Court held that use of the statute, "if possible at all," would have required the making of the judicial determination specified by § 3332(b) for the convening of an additional § 3331 grand jury when such a grand jury is already sitting. Such a determination had not been made.

For purposes of this appeal the material facts are not in dispute.

On March 17, 1971 the grand jury which indicted the defendant was convened. The order states that the grand jury is convened "pursuant to Rule 6(a) and (g), Federal Rules of Criminal Procedure" (Order, Govt. App., p.18). Rule 6(a) provides for the convening of grand juries. Rule 6(g) provides, in relevant part, as follows:

> "(g) Discharge and Excuse. A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court."

The order, tracking the terms of Rule 6(g), provides that the grand jury is "to serve for a period not to exceed eighteen (18) months from the date it is convened...." The government concedes that the March 17, 1971 grand jury was convened as a Rule 6(g) grand jury. Brief for Appellant, p.37. 2/

On August 30, 1972, Chief Judge Mishler granted the government's application to extend the grand jury beyond eighteen months. The order states that the grand jury's life is extended "[p]ursuant to Title 18, United States Code, § 3331" (Order, Govt. App., p.19). The provisions of Title I of the Organized Crime Control Act of 1970, 18 U.S.C. § 3331 et. seq. are set out in the Appendix hereto, A1-A4 .

2/ The order convening the grand jury refers to it as a "Special Grand Jury." As the government acknowledges, Brief for Appellant, p.37, footnote, Rule 6(g) grand juries are often termed "special grand juries" while § 3331 grand juries are expressly designated as such by reference to the provisions of the Organized Crime Control Act. (In addition, orders convening § 3331 grand juries usually recite that the grand jury "shall serve for eighteen (18) months...or until such time as its term may be extended pursuant to law," Affidavit in Support of Motion to Dismiss, Govt. App. pp. 9-10.) Some Rule 6(g) grand juries are termed "special" because they are convened for particular purposes. The instant grand jury was convened at the request of the Anti-Trust Division of the Justice Department to investigate anti-trust matters (Brief for Appellant, p.5).

The order was entered on the oral application of an Assistant United States Attorney made on or about the same day the application was granted. The government prepared the order for Chief Judge Mishler's signature (Accetta Affidavit, p.8 of Brief for Appellant). As appears from the government affidavit submitted below, there was no discussion by the Assistant or Chief Judge Mishler regarding the authority of the court to extend the grand jury's life. The government did not bring before the court the fact that the grand jury in question had been convened pursuant to Rule 6(a) and (g), nor that it was "special" only in the sense that it had been convened at the request of the Anti-Trust Division of the Justice Department.[3] Nor did the Assistant bring before the Court the fact that three § 3331 grand juries were already sitting.[4]

3/ The order convening the grand jury was entered by Judge Rosling (Order, Govt. App., p.18).

4/ The January 25, 1971 grand jury convened by Chief Judge Mishler and extended by Judge Rosling on June 20, 1972 (Order, Govt. App., p.80); the May 17, 1972 grand jury convened by Judge Mishler (Govt. App., p.21) and the June 19, 1972 grand jury convened by Judge Rosling (Govt. App., p.91). Of these three grand juries, only the January 25, 1971 grand jury had been sitting more than eighteen months by August 30, 1972.

Rather, all that was stated to Chief Judge Mishler was that the grand jury's "investigation had expanded to such an extent that it could not be completed before it was due to expire" and "that to re-educate another Grand Jury as to what had already transpired would be unduly burdensome," (Accetta Affidavit, Brief For Appellant, p.8).

On September 26, 1972 the grand jury indicted the defendant. The first count charged a violation of 18 U.S.C. § 201 (c)(1) in that Fein accepted approximately $1,800 in return for being influenced in his official acts in connection with his duties in the Mortgage Credit Section of the Federal Housing Administration. Count Two charged a violation of 18 U.S.C. § 1623 in that Fein gave false testimony to the grand jury. The date of the allegedly false testimony is September 19, 1972, two days after the grand jury had expired according to Rule 6(g).

ARGUMENT

I.

THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE GRAND JURY INDICTED DEFENDANT AFTER ITS LAWFUL LIFE HAD EXPIRED.

The grand jury was convened pursuant to Rule 6(a) and (g). Rule 6(g) fixes the maximum life of a grand jury at eighteen months. No provision is made for an extension. Consequently, the grand jury's lawful life expired prior to the indictment of defendant unless the order of August 30, 1972 is valid.

The government argues the order was valid for one of two reasons: first, that there exists an "implied power" of a federal district court to extend a grand jury's life (Brief for Appellant, p.23 and passim) and second, that Title I of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 3331 et. seq. grants statutory authority to extend beyond eighteen months a grand jury convened pursuant to Rule 6(a) and (g) (Brief for Appellant, pp.37-43).

A. The Argument of "Implied Power."

The government is precluded from arguing "implied power". The August 30th order was drawn and submitted by the government; it was premised explicitly and exclusively on 18 U.S.C. § 3331. The court acted on the basis of what it was led to believe was statutory authority.

Further, we can only conclude that if the court was asked to act on the basis of an "implied power" it would not have granted the government's application. The exercise of an "implied

power," particularly in the face of both a Rule and a statute covering the matter, would at best be an extraordinary judicial decision motivated by extraordinary circumstances. No such circumstances existed here. Moreover, there is no practice in the Eastern District of New York or elsewhere of extending a grand jury's life upon the basis of an "implied power" and there is no clear (or any, infra) authority to support such an "implied power."[5/]

In these circumstances, the government cannot rely upon a supposed "implied power" of the district courts. A discretionary decision cannot be justified on a theory different than that in fact relied upon in the making of that decision and involving different considerations. S.E.C. v. Chenery Corp., 318 U.S. 80; Massachusetts Trustees v. United States, 377 U.S. 235, 247; Gulf States Utilities v. FPC, 411 U.S. 747, 764; United States ex rel. Checkman v. Laird, 469 F.2d 773, 780-81 (2d Cir. 1972).

The contention is barred, as well, because the government did not argue "implied power" to the court below. (See the government's memorandum of law in opposition to defendant's motion,

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5/ The court below noted that "no doubt, [the order] would not have been made" even on the basis of the supposed statutory authority if all the circumstances had been made known to the Chief Judge (Govt. App., p.66).

set out in full in Govt. App., pp.39-46). In seeking reversal of a judgment a party cannot urge on appeal a ground never urged below.[6] The rule, of course, applies to the government no less than the defendant.[7]

Considered on the merits the government's reliance on "implied power" is utterly untenable. Even assuming such a power once existed it could not survive promulgation of Rule 6 or the Congressional legislation on the subject, with which it would be in clear conflict.

Rule 6(g) is explicit and categorical in fixing the maximum life of a grand jury. The Rule was promulgated by the Supreme Court pursuant to authority delegated by Congress and was sanctioned by Congress when it failed to reject the Rule upon its submission to that body. 18 U.S.C. § 3771. To the extent there can be thought to be an "implied power" that power (on the authority of statute) has been exercised by the Supreme Court for the district courts.

Further, Rule 1 provides that "these rules govern..." and 18 U.S.C. § 3771 provides that "[a]ll laws in conflict with

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6/ See, for example, United States v. Luster, 342 F.2d 763, 764 (6th Cir. 1965); Johnston v. United States, 254 F.2d 239, 241 (8th Cir. 1958); Morales v. United States, 373 F.2d 527 (9th Cir. 1967); Johnson v. Patterson, 367 F.2d 268 (10th Cir. 1966).

7/ See, for example, United States v. Hudspeth, 384 F.2d 683, 687 (9th Cir. 1967); United States v. Lewiston Lime Co., 466 F.2d 1358, 1359 (9th Cir. 1972).

such rules shall be of no further force or effect after such rules have taken effect." If "laws" in conflict with the Rules are superseded then surely so must an "implied power" of the district courts in conflict with the Rules.

Moreover, the authority the government seeks by the concept of "implied power" was specifically denied the district courts in the course of the promulgation of Rule 6(g). The suggestion was submitted to the Advisory Committee that the Rules should allow the court to extend a grand jury's life beyond eighteen months in order to complete unfinished investigations. Orfield, 1 Criminal Procedure Under the Federal Rules (1966), § 6.2, p.349. The Advisory Committee rejected that suggestion.

Both prior and subsequent to promulgation of Rule 6(g), Congress enacted legislation on the very subject which the government contends there is an "implied power." From 1931 to 1946, when Rule 6(g) went into effect, Congress set the power of the courts to extend the life of grand juries and the maximum time beyond which grand juries could not be extended.[8/] In doing so, Congress rejected a suggestion that district courts be empowered to allow a grand jury to sit as long as necessary to complete an

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8/ 46 Stat. 1417 (1931); 50 Stat. 748 (1937); 54 Stat. 110 (1940), all discussed infra, pp. 12-20.

investigation already underway.[9] Subsequent to promulgation of Rule 6(g) Congress has enacted legislation which authorizes courts to extend the life of a grand jury beyond eighteen months in certain narrowly specified situations and fixes the maximum life of a grand jury even in those circumstances.[10]

When Congress has legislated on a subject within its authority the other branches of government have no "implied power" in conflict with that legislation. See Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 and in particular the concurring opinions of Justices Frankfurter, Jackson, Burton and Clark. This is especially so when Congress has specifically refused to grant the claimed power in the course of legislating on the subject, ibid. The government's reliance on an "implied power," even if such a power ever existed, is frivolous.[11]

9/ See the legislative history of 50 Stat. 748 (1937), discussed infra, pp. 15-18.

10/ Title I of the Organized Crime Control Act of 1970, 18 U.S.C. § 3331 et. seq.; P.L. 93-172, 87 Stat. 691 (1973) (providing for an extended life of the "Watergate" grand jury).

11/ Indeed, the case relied on most heavily by the government, United States v. Hill, 26 F.Cases 315, No. 15, 364 (C.C.Va. 1809) has nothing to do with the question of the grand jury's permissible tenure and was decided more than a century before Congress explicitly legislated on the subject. Further, the court was concerned with the exact opposite of the situation at hand, that is, the extent of judicial power in the absence of legislation.

Clawson v. United States, 114 U.S. 477, which the government contends butresses the force of Hill for the present case, only confirms that Hill is of no relevance here. In Clawson, the Court held that the statute fixing the manner in which jurors were to be

Such an "implied power" to extend a grand jury's life, however, has never existed. The course of legislation and judicial decisions leaves no room for doubt on the matter. Congress and the courts alike have consistently recognized that the life of a grand jury is fixed by existing statute (or Rule) and that the only relief from a too restrictive prescription lies in legislation - not in the exercise of a supposed "implied power." Further, Congress (as did the Supreme Court in promulgating Rule 6(g) understood and intended that in legislating on the subject it was determining the validity of indictments, and the courts have so recognized. The government places such heavy reliance on its version of the relevant history and its version is so inaccurate that we review the subject at some length.

Originally no Congressional statute fixed the life of the grand jury. In the absence of specific legislation the matter was governed by the common-law, which provided that all judicial power ended with the term of the court. Bronson v. Schulten, 104 U.S. 410. The understanding was that an indictment returned by a grand jury after the term in which it was summoned was a nullity. United States v. Gale, 109 U.S. 65, 71.

11/ (Cont'd.)
summoned was not meant to fix the court's powers once the jurors so drawn had been exhausted. Having so found, the Court saw no objection in the issuing of a writ "necessary to the exercise of the jurisdiction of the court, and agreeable to the principles and usages of law, where it is not forbidden or excluded, and where the affirmative provisions of law have, so far as they extend, been first observed," at 487.

The Justice Department found the limitation of one term too restrictive and sought remedial legislation from Congress. "The thing sought to be accomplished [by the bill] is authority for grand juries to hold over the term," Letter of the Special Assistant to the Attorney General, Report No. 1189, Comm. on the Judiciary, Senate, 67th Congress, 4th Sess. (Feb. 24, 1923), p.2. The Justice Department noted that the practice in "one or two districts" of extending a grand jury rested on a dubious construction of existing legislation and that the Department feared to risk any important prosecution by holding over a grand jury, 12/ Senate Report No. 1189, supra, p.2.

12/ The Justice Department made specific reference to United States v. Rockefeller, 221 F. 462 (S.D.N.Y. 1914). There the court denied a motion to dismiss an indictment returned after the end of the term, stating as the sole basis for its holding that:

> "[t]he plea utterly ignores an order of this court which was fully justified and expressly authorized by the provisions of the Judicial Code," at 466.

The provisions relied upon were sections 8 and 284 of the then Judicial Code. Section 8, which the court believed applied to grand juries, read:

> "When the trial or hearing of any cause, civil or criminal, in a district has been commenced and is in process before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of said court; but the court may proceed therein and bring it to a conclusion in the same manner and with the same effect as

The bill, S.4437, 67th Cong., 4th Sess. (1923), was reported out favorably by the Senate Committee on the Judiciary,

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12/ (Cont'd.)

> if another stated term of the court had not intervened."

Section 284 provided, in relevant part, that the:

> "court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so."

Not specifically noted by the Justice Department was Elwell v. United States, 275 F. 775 (7th Cir. 1921). The district court had extended a grand jury's life beyond the term of court in which it was convened. The Court of Appeals for the Seventh Circuit affirmed an order of contempt for refusing to testify before the grand jury in its extended term. The court's brief opinion on the issue made reference to section 284 and the Rockefeller decision. The court also made reference to the grand jury being a "de facto" grand jury but cited no federal authority in that connection. Whether the latter reference, made in the context of a contempt proceeding, indicates that the court rested its decision on alternative grounds of statutory authorization and "implied power" is unclear. The view of the Seventh Circuit, in any event, was made clear in Malone v. United States, 94 F.2d 281, 283 (7th Cir. 1938), cert. den. 304 U.S. 562, in which the court read Elwell as resting on statutory grounds and in United States v. Johnson, 123 F.2d 111 (7th Cir. 1941), rev'd. on other ground, 319 U.S. 503, in which the court held that only a statute could provide authority to extend a grand jury's life and repudiated any implications to the contrary in Elwell, 123 F.2d at 120.

While the Department made no reference to Elwell its view of the "implied power" here sought to be inferred from that decision is clear. The Department stated, Senate Report No. 1189, supra, p.2:

> "[E]very reasonable argument and analogy would seem to be against the power of a court's extending a term fixed by law,

Report No. 1189, supra, but was not enacted. The Justice Department tried again in 1929 and submitted a bill "to authorize district judges, on their own motion or on the request of district attorneys or grand juries, by order to authorize such grand juries to continue to sit during the term succeeding the term at which such request is made, solely to continue business before such bodies remaining unfinished; but providing that no grand jury shall sit for more than three terms," Letter of the Attorney General, Report No. 1401, Comm. on the Judiciary, Senate, 70th Cong., 2d Sess. (January 7, 1929), p.1. The bill was reported out favorably, Senate Report No. 1401, supra, but was not enacted.

12/ (Cont'd.)

> and to call for legislation definitely permitting a grand jury to hold over the term for which it is empaneled."

Johnson v. United States, 5 F.2d 471 (4th Cir. 1925), cert. den. 269 U.S. 574, cited by the government, does not support the view that it was once thought that grand juries could be extended by the "implied power" of the court. In Johnson the court rejected the defendant's contention merely by stating that it agreed with the decision in Rockefeller, 5 F.2d at 471. Similarly, the dictum in the district court's opinion in Malone, 18 F.Supp. 865 (N.D. Ill. 1937) is of no assistance to the government. In noting that some judges had assumed there to exist an "implied power" to extend the grand jury's life the court cited only Rockefeller, Johnson and Elwell, 18 F.Supp. at 868. As to Rockefeller and Johnson the district court was patently wrong. As to Elwell any inference of an "implied power" is unclear, and was found not to exist by the Court of Appeals in Malone and was repudiated by the Court of Appeals in Johnson. Finally, United States v. Herzig, 26 F.2d 487 (S.D.N.Y. 1928), cited by the government, did not concern at all the extension of a grand jury beyond the term of court.

The Justice Department finally succeeded in 1931. It renewed its earlier requests for legislation, Report No. 71-877, Comm. on the Judiciary, Senate, 71st Cong., 3rd Sess. (June 9, 1930), and the bill was enacted, 46 Stat. 1417 (1931).[13/]

A question arose as to whether the 1931 Act granted any district judge or only the senior district judge the authority to extend a grand jury's life beyond the end of the term. The Attorney General requested a clarifying amendment, noting that a district court had dismissed an indictment on the ground that the order extending the grand jury's life had not been entered by the senior district judge. Report No. 1258, Comm. on the Judiciary, Senate, 75th Cong., 1st Sess. (Aug. 18, 1937).

The Justice Department grew dissatisfied with the maximum life of the grand jury being fixed by reference to the "terms"

13/ 46 Stat. 1417 provided in relevant part:

> "And said court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. And the district judge or the senior district judge, as the case may be, may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury: Provided, however, That no grand jury shall be permitted to sit in all during more than three terms.

of court. Terms of court varied from district to district; the longest term was six months and the shortest was one month. The effect of the statute, therefore, was not uniform and in some districts limited a grand jury's life to three months.

In urging that the provision be amended the Justice Department cited instances where grand juries had to abandon unfinished investigations because the maximum life provided by statute had been reached. The Department noted that in such cases it "was necessary to empanel a new grand jury to take up the investigation" and further complained that "[n]ecessarily, this involved re-presentation of some of the same evidence to the new grand jury in order that it might become familiar with the factual background of the investigation," Report No. 1747, Comm. on the Judiciary, House of Representatives, 76th Cong., 3d Sess. (March 11, 1940), p.5.

This is exactly the complaint of the government in the instant case by which it seeks to justify the extension of the grand jury beyond the life specifically fixed by statute. The Justice Department and Congress recognized, however, that the only remedy was legislation.

The immediate impetus for amending the statute was the extraordinary letter written by a grand jury in the Southern District of New York. The grand jury had been forced to discontinue an extensive investigation of passport frauds because it had reached the end of its third term. It had wished to continue the investigation and noted that a new grand jury would have to duplicate much

of the work already done if it was to continue the investigation.[14/] The grand jury proposed and drafted legislation which would allow a court to extend a grand jury's life from term to term without any limitation so as to permit the grand jury to continue an uncompleted investigation. H.R. Report No. 1747, supra, p.3.

The Justice Department rejected the grand jury's suggestion. While approving the grand jury's criticisms of the existing statute the Attorney General recommended to Congress that the existing law be amended so as to fix the grand jury's maximum life at a uniform eighteen months. The Attorney General though it "likely" that an eighteen month term would be sufficient. He recognized, however, that if this were not the case the grand jury would have to be discontinued. He therefore suggested that "[I]n this connection, it may be well to provide a stenographic record of testimony heard by one grand jury may be read in evidence before a subsequent grand jury, if such evidence is relevant and

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14/ The grand jury wrote, H.R. Report No. 1747, supra, pp.2-3:

> "[T]his important investigation will have to be carried on, presumably to its conclusion by another grand jury, which, if if it is to reach the comprehensive results that we foresee as possible will have to hear over again much that we have done. And such requisite repetitions will inevitably cause otherwise unnecessary expenditures of public moneys and time on the part of the district attorney and his able staff."

material to cases under investigation by the latter," Letter of Attorney General Jackson, H.R. Report No. 1747, supra, p.4.

The House Judiciary Committee, with the New York grand jury's proposal before it, adopted the Attorney General's position. It recommended passage of a bill fixing the maximum life of a grand jury at eighteen months, noting the consequences of the "three terms" rule. The bill was enacted, 54 Stat. 110 (1940).[15/]

15/ Morris v. United States, 128 F.2d 912 (5th Cir. 1942), cert. den. 317 U.S. 661, does not construe the 1940 Act in a manner contrary to that urged here, as the government suggests. Rather, that decision concerns a wholly different provision of the statute, providing that "[n]o grand jury shall be summoned to attend any district court unless the judge thereof...orders a venire to issue therefor." The defendant contended that this provision, with its reference to the "district court," prohibited the summoning of a grand jury in any division of the district so long as a grand jury was sitting in another division. The court construed the provision otherwise, concurring in the decision in United States v. Perlstein, 39 F.Supp. 965 (N.J. 1941), aff'd. 126 F.2d 789 (3d Cir. 1942) (en banc), cert. den. 316 U.S. 678. As an alternative ground for its decision, the court departed from the opinion in Perlstein and held that the provision was directory only. Its comment that Congress did not intend to affect the validity of indictments, set out by the government, Brief for Appellant, p.30, refers to the provision under consideration, not the statute's prescription regarding the grand jury's tenure.

Similarly, the government's reliance upon United States v. Malone, supra, is misplaced. The issue there was whether any district judge rather than the senior district judge was granted the authority by the 1931 Act as amended to extend a grand jury beyond the term. The court concluded that the statute, at least up to the 1937 amendment, allowed any district judge to enter such an order. After canvassing the legislative history of the provision the court concluded that the 1937 amendment of the provision was not intended to make any changes in that respect.

Thus, Congress (as did the Attorney General) specifically rejected the suggestion that it grant to the district courts the power the government erroneously urges those courts always have possessed, and despite the fact that the reasons urged for that suggestion were identical to those urged here.

During the time when 46 Stat. 1417 and its amendments were in effect, the courts had before them motions to dismiss indictments based on the contention that the indictment was returned at a time not permitted by the statute. When it was argued that the term of court had ended prior to the return of the indictment, the court decided the issue exclusively on the basis of the statute, that is, by determining whether the term in fact had ended before return of the inductment and, if so, whether an order had been entered pursuant to statute extending the grand jury's life. 16/

16/ United States v. Michener, 152 F.2d 880 (3d Cir. 1945); United States v. Parker, 103 F.2d 857 (3d Cir. 1939); Stillman v. United States, 177 F.2d 607 (9th Cir. 1949); United States v. Foote, 42 F.Supp. 717 (Del. 1942); United States v. Borden Co., 28 F.Supp. 177 (N.D. Ill. 1939), mod. on other grounds, 308 U.S. 188; United States v. Central Supply Ass'n., 37 F.Supp. 890 (N.D. Ohio 1941); United States v. Perlstein, supra.

In United States v. Johnson, U.S.D.C., N.J., No. 384(c) (1941), discussed in United States v. Perlstein, supra at 970, the indictment was dismissed as it was returned after the end of the term and "accordingly...the grand jury was without power to find the indictment...," Perlstein, supra at 970. In Perlstein itself the same judge refused to dismiss the indictment as he found that the term of court had not in fact ended prior to return of the indictment.

A less extreme violation of the statute was also urged: that an indictment was the result of an investigation begun in the court-ordered extended term rather than the result of an investigation begun in the original term. Again, the courts, including the Supreme Court, decided the issue exclusively on the basis of the statute. Where a violation of the statute was found the indictment was dismissed;[17] where no violation was found the indictment was not dismissed.[18]

United States v. Johnson, supra, provoked the next stage. In Johnson, the grand jury's life had been twice extended by court order entered pursuant to 46 Stat. 1417 (1931), as amended. The Court of Appeals, 123 F.2d 111 (7th Cir. 1941) read the order as allowing the grand jury to make in its second and third terms investigations not begun in its first term as required by statute.

17/ United States v. Johnson, 123 F.2d 111 (7th Cir. 1941), rev'd. on other grounds, 319 U.S. 503; Evaporated Milk Ass'n. v. Roche, 130 F.2d 843 (9th Cir. 1942) (en banc), rev'd. on other grounds, 319 U.S. 21; United States v. McKay, 45 F.Supp. 1007 (E.D. Mich. 1942).

18/ United States v. Johnson, 319 U.S. 503, rev'g. 123 F.2d 111 (7th Cir. 1941).

Accordingly, the court held the indictment had to be dismissed.[19]

The Supreme Court reversed, 319 U.S. 503. It did not, however, question the Court of Appeals' premise that if the order extending the grand jury did not comply with the statute the indictment had to be dismissed. To the contrary the Court explicitly affirmed that principle, stating, at 508:

> "This is the order which gives rise to the controversy, for upon its legality depends the validity of the indictment thereafter returned by the grand jury."

The Court found the Court of Appeals had misread the order and that the grand jury had been permitted to continue in its third term only those investigations begun in its first term.[20]

19/ The dissenting judge fully agreed that if the order extending the grand jury did not comply with the statute the indictment had to be dismissed. 123 F.2d at 131, 132. However, he found the order to be in compliance with the statute.

20/ The government seeks to avoid the dispositive import of the Supreme Court's decision in Johnson by citing Roche v. Evaporated Milk Ass'n., 319 U.S. 21. In Roche the Court of Appeals, 130 F.2d 843 (9th Cir. 1942) (en banc) had ordered an indictment dismissed for exactly the same reasons as the Court of Appeals in Johnson had found the indictment there invalid. On appeal the Supreme Court reversed exclusively on the ground that the Ninth Circuit was incorrect in employing mandamus to review the issue. There is not the slightest expression of doubt in the Court's opinion that if the statute had been violated dismissal was required. That such was the view of the Court is confirmed by its decision later in the same term in Johnson.

Further, the issue in Roche sought to be presented by mandamus was whether the grand jury had exceeded the statutory restric-

The decision in Johnson highlighted the difficulties posed by the statute. Prosecutions were jeopardized by the exceedingly subtle distinction between indictments returned as the result of an investigation begun in the original term and indictments returned as the result of investigations initiated in the court-ordered extended terms. Nonetheless, the Advisory Committee failed to address the problem in its first Preliminary Draft of the Federal Rules of Criminal Procedure. The Supreme Court believed the matter of such importance that it asked the Advisory Committee to consider the questions raised in United States v. Johnson, supra, with a view to modifying the existing statute. Orfield, supra, pp.341-42. The Advisory Committee responded by drafting what is now Rule 6(g), Orfield, supra, p.343.

In so doing, the Advisory Committee fully intended to establish an inflexible maximum on the life of the grand jury and to determine the validity of indictments. Such had been the

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20/ (Cont'd.)

tions on the scope of its activities in the extended term. The government argued before the Supreme Court that the issue was not jurisdictional and therefore was inappropriate for mandamus, unlike a contention that a grand jury "had not been duly authorized to sit during the [extended] term." Brief for Petitioners, pp.17-18, Roche v. Evaporated Milk Ass'n., supra. In the instant case we have the latter issue.

intent and effect of the existing statute. The Committee sought to modify that statute only so as to eliminate the restrictions on the indictments a grand jury could return during its lawful life.[21] United States v. Johnson, supra, in which both the Supreme Court and the Court of Appeals had held the validity of an indictment to turn upon compliance with the statute, was pointedly brought before the Committee. Finally, commentary contemporaneous with promulgation of the Rules clearly indicates the Committee's intent.[22]

21/ The Committee achieved this result by retaining the eighteen month limit on the grand jury's life, eliminating the need of court orders for the grand jury to sit for the full eighteen months and providing that "[t]he tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court."

22/ Judge Alexander Hotzoff, at the time Secretary of the Advisory Committee and Special Assistant to the Attorney General, wrote, Hotzoff, Reform of Federal Criminal Procedure, 12 Geo. Wash. L. Rev. 119, 134-35 (1944):

> "[A] specific time limitation is fixed by the rules on the duration of service of a grand jury, in the place of the present flexible limitation dependent on the term of court. The time prescribed is eighteen months, unless the grand jury is sooner discharged by the court. On the other hand, under existing law, a grand jury serves for the term for which it is summoned, but its service may be extended by the court solely to finish investigations previously begun, with the limitation that no grand jury may be permitted to sit in all for more than eighteen months. At times, this provision gives rise to difficult

Congress itself has provided confirmation by recognizing that relief from the Rule's prescription can be obtained only by legislation. Congress passed Title I of the Organized Crime Control Act precisely because Rule 6(g) required the discharge of grand juries after eighteen months and that time was felt to be inadequate for investigations of "organized crime." See infra, pp. 31-34. Similarly, Congress enacted special legislation allowing the "Watergate" grand jury to sit beyond eighteen months rather than have the grand jury discharged, P.L. 93-172, 87 Stat. 691 (1973). See infra, pp. 29-30.

In light of the above, it cannot be seriously maintained that there exists now, or has ever existed, an "implied power" of federal district courts to extend a grand jury's life beyond the limit fixed by law. The District Court's adherence to the relevant statutes, far from not taking "account of the dominant trend of the applicable precedents as well as the Congressional intent," Brief for Appellant, p.11, is required by the unambiguous Congressional intent and the relevant judicial precedents.

22/ (Cont'd.)

> questions in respect to validity of indictments found during an extended period of service of the grand jury....The rule would entirely eliminate controversies of this nature...." [emphasis supplied]

B. The Argument That Title I of the Organized Crime Control Act of 1970 Provides Authority for Extending a Grand Jury Convened Pursuant to Rule 6(a) and (g).

The language and legislative history of 18 U.S.C. § 3331 et. seq. provide no authority for extending beyond eighteen months a grand jury convened pursuant to Rule 6(a) and (g). Rather than being "silent" on the matter, as the government suggests (Brief for Appellant, p.40), the language and legislative history clearly preclude such a use of the statute.

As appears from the face of the statute Title I establishes a distinctive type of grand jury. Such grand juries are to be convened by authority of and pursuant to § 3331(a). The grand juries so convened are "[i]n addition to such other grand juries as shall be called from time to time," § 3331(a) (emphasis supplied), that is, in addition to Rule 6 grand juries. § 3331(a) itself provides that grand juries convened under its provisions "shall serve for a term of eighteen months...." Provision is made in § 3331(a) for relief from this limitation. Plainly referring to grand juries convened under § 3331(a), the next sentence of the section states:

> "If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so

extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter."

In addition to the possibility of a life beyond eighteen months, Title I provides for other procedures and powers which are innovative and inconsistent with those provided for by Rule 6.[23] The language of the statute is clear that these

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23/ Among the distinctive features are the following:

(a) The grand jury serves for a term of eighteen months unless there is a "determination of the grand jury by majority vote that its business has been completed," § 3331(a). If the court orders its discharge without such a vote, the grand jury, upon a majority vote, may apply to the chief judge of the circuit for an order continuing the grand jury, § 3331(b). The grand jury may similarly act if the court fails to extend the grand jury's life beyond eighteen months, § 3331(b). In contrast, Rule 6(g) lodges solely in the court the discretion to discharge a grand jury and provides no means by which the grand jury can object to being discharged.

(b) The grand jury may issue public reports of certain specified types and an elaborate mechanism is established in connection therewith, § 3333. In contrast, there is no provision in Rule 6 for such reports. Indeed, judicial decisions under that Rule have held such reports to be of dubious legality. See, for example, Application of United Electrical Radio and Machine Workers, 111 F.Supp. 858 (S.D.N.Y. 1953); In re Petition for Disclosure of Evidence Before October 1959 Grand Jury, 184 F.Supp. 38 (E.D. Va. 1960). Congress was well aware that it was departing from prior federal federal practice in this respect, Report No. 91-617, Comm. on the Judiciary, Senate, 91st Cong., 1st Sess. (Dec. 18, 1969), p.49.

(c) The Act requires the United States Attorney, upon the request of any person having information concerning an alleged offense, to inform the grand jury of such alleged offense, the identity of

distinctive features apply only to grand juries convened pursuant to § 3331(a).

Further, § 3334 provides that the provisions of the Federal Rules of Criminal Procedure "applicable to regular grand juries shall apply to special grand juries, to the extent not inconsistent with sections 3331, 3332, or 3333 of this chapter." There is no provision that the statute or any of its sections may be applied to Rule 6 grand juries.

The legislative history leaves no room for doubt that Congress meant what it unambiguously said. As introduced the bill which ultimately was enacted, S.30, applied to all grand juries and was in the form of an amendment to Rule 6. Hearings, Comm. on the Judiciary, Senate (March 18, 1969), pp.4-13. It included a provision permitting the extension of all grand juries beyond eighteen months. The sweeping application of the bill, as well as its substantive features, generated considerable opposition, including opposition by the Judicial Conference of the United States. 115 Cong. Rec. S.33573 (Nov. 10, 1969); Hearings, Comm. on the Judiciary, House of Representatives, 91st Cong., 2d Sess. (May 10,

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23/ (Cont'd.)

the informant and the United States Attorney's actions or recommendations, § 3332(a). Rule 6 contains no such requirement.

1970), pp.122-25.[24] The Senate Judiciary Committee modified the scope of the bill to its present form. Chief Judge Kaufman of this Circuit noted the change in writing on behalf of the Judicial Conference, House Hearings, supra, p.122:

> "I note that since the Jury Committee [of the Judicial Conference] evaluated Title I [of S.30], the bill has been amended in several respects. Title I does not now apply to all grand juries, as it did when I first saw it, but only to certain special grand juries which shall be impaneled as a matter of course in larger judicial districts or upon the certification of the Attorney General, his Deputy, or Assistants in other districts.[25]

24/ See, as well, the statements of the New York County Lawyers Assn., Senate Hearings, supra, p.239 and of the American Civil Liberties Union, Senate Hearings, supra, p.456.

25/ The Senate Judiciary Committee stated its intention clearly, Senate Report No. 91-617, supra, p.141:

> "Section 3331(a) requires, in addition to regular grand juries, the summoning of special grand juries. It also regulates the term of service of each such grand jury."

On the Senate floor, Senator Hruska, one of the sponsors of the bill, stated, 116 Cong. Rec. S.601 (Jan. 21, 1970):

> "Title I, for example, recognized that the grand jury is without peer as an instrument of discovery against organized crime, and provides for the impanelling of special grand juries, in addition to regular grand juries....Such special grand juries would

Further confirmation is provided by the "Watergate" grand jury bill recently enacted by Congress. P.L. 93-172; 87 Stat. 691 (1973). The grand jury which had been investigating "Watergate" was convened under Rule 6. To extend its life beyond eighteen months the government did not seek an order under 18 U.S.C. § 3331(a), even though the same circumstances as those urged by the appellant here were present with truly compelling force - a grand jury occupied for a considerable time in investigating an extremely complex situation involving perjury, obstruction of justice, bribery and conspiracies to commit same by government officials. Rather, the Attorney General found it necessary to

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25/ (Cont'd.)

> be empowered...to extend their term up to 36 months...."

The House Judiciary Committee made nearly identical statements, Report No. 91-1549, Comm. on the Judiciary, House of Representatives, 91st Cong., 2d Sess. (Sept. 30, 1970), pp.32, 39. The Justice Department noted, House Hearings, supra, p.158:

> "The special grand juries differ in several material ways from regular grand juries. For example, the ordinary term of a special grand jury will be eighteen months, but will be subject to extension for 36 months...."

take the extraordinary measure of seeking special legislation. He wrote to Congress: "Under F.R. Crim. P. Rule 6(g) it [the grand jury] cannot continue more than 18 months without a statutory extension." Report No. 93-618, Comm. on the Judiciary, House of Representatives, 93d Cong., 1st Sess. (November 1, 1973), p.3. The House Judiciary Committee concurred. House Report No. 93-618, supra, p.2 and reported the bill out favorably.[26/]

Title I of the Organized Crime Control Act of 1970 alters in several significant respects the nature of the federal grand jury. Considerable controversy surrounded its innovative provisions, as is evidenced by the legislative history. Congress assiduously sought to limit application of these provisions. It made the provisions of Title I applicable only to grand juries convened pursuant to the Act itself and left undisturbed other grand juries. It permitted creation of section 3331 grand juries only in certain specified judicial districts, § 3331(a). Even in

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26/ The "Watergate" grand jury bill was not the first instance of the Justice Department recognizing that a Rule 6 grand jury can be extended only by statutory authorization and consequently seeking such legislation. The Attorney General noted, House Report No. 93-618, supra, p.4:

> "The present law does not permit judicial extension of the life of a general grand jury. I recognize that statutory extensions have usually been discouraged...."

those districts, Congress provided that only one section 3331 grand jury may sit at a given time, except upon a discretionary decision by the district court based upon a determination that the volume of business of the grand jury convened pursuant to the Act exceeded its capacity to discharge its obligations, § 3332(b).

Among the Act's departures from long-standing practices is the provision permitting an extension of the life of a section 3331 grand jury beyond a term of eighteen months. At common-law the life of the grand jury ended with the term of court in which it was convened, and, until the Act of February 25, 1931, 46 Stat. 1417, such was the rule in the federal courts. The typical term of court was one month and no longer than six months. At the repeated urgings of the Justice Department, Congress lengthened the grand jury's life up to a maximum of eighteen months; in doing so, however, Congress limited the activity of the grand jury to investigations begun in the first term of court. Finally, Rule 6 eliminated the restrictions as to the matters to be investigated within the eighteen month tenure.

In doubling the permissible life of a federal grand jury Congress acted for narrow and pragmatic reasons. Congress' purpose in enacting Title I of the Act was to combat "organized crime." The President's Commission on Law Enforcement and Administration of Justice, in a chapter on organized crime in its report

"The Challenge of Crime in a Free Society" (1967), had noted, at p.200, that the grand jury was an invaluable weapon against organized crime but that the grand jury's usefulness was being diminished by its inability to "stay in session long enough for the unusually long time required to build an organized crime case." The Commission recommended remedial legislation. Congress enacted § 3331(a) in order to implement this recommendation. See, for example, 116 Cong. Rec. 35290 (1970) (remarks of Representative Poff, one of the chief sponsors of the Act); House Hearings, supra, pp.158, 176-77, House Report No. 91-1549, supra, p.39. More particularly, the purpose of § 3331(a), in creating a particular type of grand jury "in addition to such other grand juries as shall be called from time to time" and permitting the extension of that grand jury's life beyond eighteen months, was:

> "...to make available a sufficient number of grand juries in each judicial district to accommodate the general needs of the district and the special needs of the typically lengthy organized crime case."

House Report No. 91-1549, supra, p.39. 27/

27/ The other provisions of Title I are also tailored to the purpose of combating organized crime. The limitation of the Act to judicial districts with more than four million inhabitants was designed to confine section 3331 grand juries to areas "of major organized criminal activity in the United States," Senate Report

While section 3331(a) is meant to meet only the pragmatic problems presented by organized crime investigations, the Act nowhere defines "organized crime." The reason for this was explained by Deputy Assistant Attorney General Petersen before the House Judiciary Committee, House Hearings, supra, p.177:

> "The CHAIRMAN. These provisions of title I are not limited to organized crime or organized crime investigations. They cover the crime front, everything. Is that right?
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> * * *
>
> Why is that? This is supposed to be an organized crime bill primarily. Why do these provisions so materially change the function of the grand jury applying broadened powers to all types

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27/ (Cont'd.)

No. 91-617, supra, p.141. In addition, such grand juries can be convened upon certification of the Attorney General, § 3331(a); while the Act speaks simply of certification of "criminal activity," the intendment of Congress was clearly that certification be made only upon a finding of organized criminal activity. See Senate Report No. 91-617, supra, p.141 ("...where warranted in [the Attorney General's] judgment by organized crime conditions"); statement of Assistant Attorney General Will Wilson, Senate Hearings, supra, p. 410. Grand juries created by the Act are empowered to issue reports, § 3333, but only concerning "noncriminal misconduct, malfeasance, or misfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee..." or "regarding organized crime conditions in the district."

> of investigations. What is the necessity for that?
>
> Mr. PETERSEN. I think the fact of the matter is that 'organized crime' is a rather generic definition. The organization itself is not per se illegal or not subject to prosecution because of innate illegality. The organization and its members are subject to prosecution only to the extent that they violate specific statutes of the United States. That, of course, covers the whole criminal code.
>
> I think it is rather difficult to distinguish in a statute between organized criminals who commit violations which run the gamut of the entire criminal code, and nonorganized criminals who may commit those very same offenses."

Congress consequently relied upon methods other than a definition of "organized crime" to limit the Act. Chief of these was to make the distinctive features provided by Title I applicable only to grand juries convened pursuant to Title I.[28/] To

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28/ Responding to criticism that the provisions of Title I of S.30 (as amended by the Senate Judiciary Committee) did not in terms confine the § 3331(a) grand jury's activities to "organized crime," Senator McClellan, the primary sponsor of the bill, stated, 116 Cong. Rec. 968 (Jan. 23, 1970):

> "...this would be a special grand jury convened for the very purpose of investigating organized crime. This power [of issuing reports] is conferred on that special grand jury and not a regular grand jury. It is hand and glove with this program we are talking about."

permit the application of Title I to grand juries not convened pursuant to the Act but pursuant to Rule 6(a) and (g), therefore, would not only be contrary to the unambiguous language and legislative history of the statute but would do serious violence to Congress' fundamental intent and to the basic statutory scheme. 29/

Even if § 3331 et. seq. may be applied to a Rule 6(g) grand jury so as to extend its life beyond eighteen months the order of August 30, 1972 is nonetheless invalid. Section 3332(b)

29/ The oral decision in United States v. McDonnell and Fetell (73 Cr. 562) (E.D.N.Y.) cannot be accorded significant weight on this question. Judge Weinstein held that § 3331 provided statutory authority for extending the same Rule 6(g) grand jury at issue here (Govt. App., p.57). As the court below noted (Govt. App., p.63), Judge Weinstein did not have before him the legislative history of § 3331 et. seq. presented to Judge Dooling and this Court. Nor, we may add, did Judge Weinstein have before him a detailed analysis of the language and structure of the statute, any exposition of the history of Congressional actions concerning the life of the grand jury or the judicial decisions on the subject. Further, the rather informally reasoned decision was considered to be tentative by Judge Weinstein himself. After denying the defendant's motion to dismiss, Judge Weinstein noted, Govt. App., p.61:

> "I understand the submission and I appreciate the force of it and if there is a conviction you can review [sic] the motion and I will perhaps then write on it but for now I deny the motion."

The matter was not renewed as the prosecution was otherwise disposed of.

establishes when a section 3331 grand jury can be convened if such a grand jury is already sitting. At the very least there must be compliance with this provision if there is to be a "conversion" of a Rule 6(g) grand jury into a section 3331 grand jury - an event totally contrary to the statute's language and history. The provision provides:

> "Whenever the district court determines that the volume of business of the special grand jury exceeds the capacity of the grand jury to discharge its obligations, the district court may order an additional special grand jury for that district to be impaneled."

Without the determination set forth in § 3332(b) an additional section 3331 grand jury cannot be convened. Section 3332(b) is the sole provision of the statute granting authority for the convening of a section 3331 grand jury when another such grand jury is already sitting. 30/

30/ Section 3331(a) requires the convening of a special grand jury "at least once in each period of eighteen months unless another special grand jury is then serving." It contains no provisions to when and how a section 3331 grand jury may be convened if "another special grand jury is then serving." Those provisions are found in § 3332(b). The phrase "at least once in each period of eighteen months" in § 3331(a) serves to establish that the only requirement of § 3331(a) is that one special grand jury sit during any eighteen month period rather than that a § 3331(a) grand jury always be sitting.

We further note that § 3332(b) would be superfluous if it was not meant to be the only provision granting authority to convene an additional section 3331 grand jury when such a grand jury is already sitting. There is nothing in existing law preventing a grand jury from suggesting to the court that an additional grand jury be convened.

On August 30, 1972 three section 3331 grand juries were already sitting. See supra, p.4, ftn.4. The order "converting" the instant grand jury fails to reflect that the determination required by § 3332(b) was made. The government did not contend below, nor does it contend here, that such a determination was made. To the contrary, the affidavit of Assistant United States Attorney Accetta, purporting to detail the application made to Chief Judge Mishler and the Chief Judge's response, is utterly silent on the subject (Brief for Appellant, p.8).

Compliance with the requirements of § 3332(b) is necessary to effectuate basic Congressional intent. Congress created the section 3331 grand jury for the particular purpose of combating organized crime. It sought to limit the number of section 3331 grand juries to what was necessary for that purpose and to confine those grand juries to organized crime investigations. It could not, however, achieve its intent through substantive provisions, that is, the definition of "organized crime." It relied, therefore, upon certain procedural devices. Section 3331 requires the convening of a section 3331 grand jury. To that existing grand jury would presumably go those matters appropriate to its special character and purpose, organized crime investigations. Additional organized crime investigations would be put before this existing section 3331 grand jury until "the volume of business" of that grand jury exceeded its "capacity...to discharge its obligations,"

§ 3332(b). Those organized crime investigations which could no longer be absorbed would be put before an additional section 3331 grand jury convened for that purpose.

This function of § 3332(b) is confirmed by the legislative history of § 3332(b), as is the intention that the judicial determination was meant by Congress to be much more than pro forma.

As passed by the Senate, the provision of S.30 regarding the convening of an additional special grand jury lodged the decision in the existing section 3331 grand jury. Upon a majority vote of the members of the existing section 3331 grand jury that the volume of business before it exceeds its capacities, the grand jury could make an application to the court for the convening of an additional section 3331. Upon such an application and "a showing of need" the court was required to convene an additional section 3331 grand jury. S.30, § 3332(c) in House Hearings, supra, p.5.

The displacement of the court's role in the decision to convene an additional grand jury was opposed by the Judicial Conference, among others. Chief Judge Kaufman communicated the Judicial Conference's opposition, explaining that the provision rested on the:

> "unstated assumption that the grand jury is better able to determine the proper length and scope of investigations into criminal activities than is a federal

> court. The Committee found itself unable to accept the theory that a grand jury functions best when supervised least...."

House Hearings, supra, p.124. Accordingly, Congress amended the provision so as to rest in the court the responsibility for determining whether an additional section 3331 grand jury should be convened.[31/]

The government seeks to avoid the clear language and intendment of § 3332(b) by arguing that the instant grand jury was in fact investigating "organized crime." Whether or not this was so is irrelevant. Failure to comply with a procedural requirement established by Congress as a means to achieve a purpose of the legislation is fatal. See, for example, United States v. Giordano, ___ U.S. ___, 42 U.S.L.W. 4631 (May 14, 1974). Further, the effect of the argument would be to substitute the government's retrospective characterization of a grand jury's investigation for the district court's decision as to whether the type of investigation contemplated is appropriate for and requires a section 3331 grand jury. Congress contemplated the latter.

31/ The House Judiciary Committee, which amended S.30 in accordance with the recommendations of the Judicial Conference, noted, House No. 91-1549, supra, p.32: "As amended by the Committee, the bill would require such grand juries to be subject to the control of the district court...."

Finally, § 3332(b) was meant to effectuate Congress' intent that there should be as few section 3331 grand juries as would be consistent with the needs of investigating organized crime, as well as to effectuate the Congressional intent that such grand juries should investigate organized crime. The government has not even addressed the former consideration. It has not argued, let alone introduced evidence, that the "volume of business" before each of the three existing section 3331 grand juries exceeded its "capacity...to discharge its obligations."

II.

THE I.. ICTMENT WAS PROPERLY DISMISSED.

The government argues that the indictment was improperly dismissed even if the grand jury indicted the defendant after expiration of its lawful life. The argument is without merit.

We have set out at length the history of Congressional legislation on the subject of the grand jury's life and of Rule 6(g). That history makes abundantly clear what is apparent on the face of the various Congressional statutes and Rule 6(g): Congress and the Supreme Court did intend to legislate as to the validity of indictments.

Consonant with the clear Congressional language and intent, the courts have held the statutes regarding the life of the grand jury to require dismissal if violated. Dispositively, the Supreme Court explicitly stated so in United States v. Johnson, supra at 508, and rendered an opinion explicable only upon that premise. See, as well, the numerous cases noted supra, pp. 19-20. 32/

32/ The government contends that all these decisions can now be overruled because they were based on a too literal reading of the Supreme Court's statement in In Re Mills, 135 U.S. 263, 267, that "Grand Juries are a creature of statute." The suggestion not only overlooks the Court's statement in United States v. Gale, supra at 71, that an indictment returned after the grand jury's lawful life is a nullity, and the Court's decision in United States v. Johnson, supra, but comes much too late. Moreover, whether or not grand juries are a "creature of statute" as an abstract jurisprudential concept is of no importance once Congress has definitively and repeatedly made grand juries the creature of statute and particularly in regard to the lawful life of the grand jury.

The result under Rule 6(g) must be the same. That rule is the successor to the Congressional statutes noted above and was promulgated by the Supreme Court and the Advisory Committee with the same understanding and intent as Congress acted in regard to its predecessors. Indeed, Judge Weinstein as well as the court below held that a violation of Rule 6(g) requires dismissal (Govt. App., pp. 57-58).

The government also asserts that the indictment should not be dismissed absent a showing of "prejudice." This argument, as well, is dispositively refuted by the language and history of the various statutes discussed and of Rule 6(g). Congress and the Supreme Court (in promulgating Rule 6(g)) intended to legislate as to the validity of indictments; there is no suggestion that indictments returned after the prescribed life of the grand jury were to be dismissed only upon a showing of prejudice. Just the contrary clearly appears.

Accordingly, the courts, including the Supreme Court, have applied the provisions concerning the life of the grand jury without regard to the existence or absence of "prejudice" and have dismissed the indictment when a violation was found. Such has been the result even when the contention under the older statute was merely that the indictment was the result of an investigation begun in the court-ordered second term of the grand jury rather than

in the first term. See cases cited supra, pp. 19-20 , fns. 10-18.[33/]

33/ That prejudice is irrelevant is further shown by those decisions in which contentions as to the lawful life of the grand jury were decided without any reference to prejudice while prejudice was required in regard to other errors urged in regard to the grand juries. See United States v. Parker, supra; United States v. Stillman, supra.

In Morris v. United States, supra, cited by the government, the defendant contended that the grand jury was unlawfully sitting as the existing statute permitted only one grand jury to sit at a given time for the entire district. The court noted that irregularities in grand jury procedures do not require dismissal of an indictment absent a showing of prejudice but that such a showing was not necessary when the challenge went to the lawful existence of the grand jury. The court held the defendant's challenge to be of the latter sort and decided the issue on the merits. Morris v. United States, supra at 914.

The government fails to note the numerous decisions applying the provisions regarding the grand jury's permissible life without regard to the existence vel non of prejudice. Rather, the government relies upon decisions regarding procedural irregularities of the sort found to require a showing of prejudice in Morris v. United States, supra; United States v. Parker, supra, and United States v. Stillman, supra. See Agnew v. United States. 165 U.S. 36 (completing a grand jury by selecting jurors from the county in which the court was sitting rather than from the whole district); Breese v. United States, 226 U.S. 1 (delivery of the indictment to the court by the foreman without the other grand jurors being physically present); Breese v. United States, 203 F. 824 (4th Cir. 1913) (failure of court to enter an order directing issuance of a writ of venire facias); Nolan v. United States, 163 F.2d 768 (8th Cir. 1947), cert. den. 333 U.S. 846 (failure of court to actually sign the written order directing issuance of a writ of venire facias); United States v. Eagan, 30 F. 608 (8th Cir. 1887) (completing a grand jury by summoning grand jurors from the body of the district rather than from the list drawn according to statute when the number of jurors so drawn is insufficient); United States v. Wallace and Tiernan, Inc., 349 F.2d 222 (D.C. Cir. 1965) (the impaneling of a grand jury by the district judge assigned by the court to discharge that function rather than by the Chief Judge of the district, as allegedly provided for in the District of Columbia statute).

Failure to comply with the prescribed maximum life of the grand jury is, however, prejudicial as a matter of law. The statutory prescription guarantees that the grand jury has a relatively short life and this helps implement the important value behind the constitutional guarantee of indictment by grand jury: that the grand jury serve as the citizens' shield against the government and not merely as an instrument of prosecution. See, for example, Ex Parte Bain, 121 U.S. 1, 11; Wood v. Georgia, 370 U.S. 375, 390. It

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33 cont'd./ Further each of these decisions relied upon a provision of law which the court found to be directory and not meant by Congress to affect the validity of indictments. We have shown that the provisions of law regarding the life of the grand jury were intended to affect the validity of indictment and have always been understood to do so.

Shimon v. United States, 352 F.2d 449 (D.C. Cir. 1965), lends no support to the government's contention. The few sentences in the court's opinion relied upon by the government are at best ambiguous. Compare with the government's reading the interpretation by the court below, Govt. App., pp. 71-72. In any event, the decision is of no force here even if it is assumed that the court was expressing a conclusion that the provisions of the D.C. Code at issue was not meant to affect the validity of indictments and therefore a showing of prejudice was necessary for dismissal. That conclusion, if such it was, was based upon the elaborate historical analysis in United States v. Wallace and Tiernan, Inc., supra, of a different part of the same provision of the D.C. Code. Here the historical analysis of Rule 6(g) and its predecessors, as well as the judicial decisions under those provisions, leads to the conclusion that Rule 6(g) was intended to affect the validity of indictments. We also note that in Shimon the challenge was to the grand jury the defendant allegedly obstructed, not the grand jury which returned the indictment.

does so in two ways.

The grand jury can act as the citizens' shield because it is composed of a cross-section of the common citizenry. Ex Parte Bain, supra at 11; Hurtado v. Calif., 110 U.S. 516 (Harland, J. dissenting); United States v. Wells, 163 F. 313, 324-5 (D. Idaho 1908). "The grand jury breathes the spirit of a community into the enforcement of law," Chief Judge Kaufman, The Grand Jury - Its Role and Powers, 17 F.R.D. 331, 334. A long tenure would tend to undermine the protective character of the grand jury as the grand jurors would tend to become detached over time from the community and become "professionals." A short term serves to preserve its popular character as a body of "non-professionals." In re Bornn Hat Co., 184 F. 506, 509 (S.D.N.Y. 1911) (Hand, J.) aff'd. 223 U.S. 713; Moore, Federal Practice, Rules of Criminal Procedure (1973), p.6-12; Younger, The Grand Jury Under Attack, 46 J. Crim. L. 26, 42-43, 48 (1955); Kuh, The Grand Jury "Presentment": Foul Blow or Fair Play?, 55 Colum. L. Rev. 1103, 1125 (1955).

Similarly, the grand jury, if it is to act as the citizens' shield, must maintain its independence from the prosecutor. United States v. Dionisio, supra at 16; Stirone v. United States, 361 U.S. 212, 218. The undue influence that may be exercised by the prosecutor even absent deliberate misconduct has often been

noted.[34/] The natural dominance of the prosecutor tends to increase over time. Orfield, supra, p.350; Note, 72 Yale L.J. 590, 593 (1960). The prescription of a relatively short term serves to mitigate this effect.

A line must be drawn in order to protect against the prejudice caused by a grand jury sitting too long. The matter is not susceptible of empirical proof in a given case. First Congress and now the Supreme Court have drawn that line. Suggestions that a grand jury be permitted to sit as long as necessary to complete an investigation already underway were rejected. Orfield, supra, p. 349. Similarly, suggestions that the grand jury's life be shorter or longer than the eighteen months prescribed by Rule 6(g) were rejected. Orfield, supra, pp.349-350. The line so drawn must be

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34/ See, for example, United States v. Dionisio, supra at 23 (Douglas, J., dissenting); United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972); United States v. Umans, 368 F.2d 725, 730 (2d Cir. 1970); United States v. Wells, supra; Campbell, The Grand Jury, 55 F.R.D. 229, 253 (1972); Botein, The Prosecutor, ch. 14 (1941); Antell, The Grand Jury: Benighted Supergovernment, 51 A.B.A.J. 153 (1965).

This is hardly avoidable given the formal structure of the grand jury. The court rarely has further contact with the grand jury after giving a general charge. The prosecuting attorney draws up charges, outlines the government's case, calls and examines witnesses, presents evidence, sets forth the law, and requests findings. The secrecy of the hearings and the absence of everyone except grand jury members, stenographers, prosecutorial personnel, interpreters when required, and the witness under examination strengthen the prosecutor's position by substantially precluding external checks on his conduct.

honored.

We also note that the defendant has been prejudiced in the most direct manner conceivable. Not only has he been indicted but one of the counts of the indictment is the giving of allegedly false testimony to the grand jury after its lawful life had expired.

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENT SHOULD BE AFFIRMED.

Dated: July 3, 1974

Respectfully submitted,

VICTOR RABINOWITZ
RABINOWITZ, BOUDIN & STANDARD
Attorneys for Appellee
30 East 42nd Street
New York, New York 10017

Of Counsel and on the Brief:

Michael Krinsky
Rabinowitz, Boudin & Standard

TITLE I—SPECIAL GRAND JURY

Sec. 101. (a) Title 18, United States Code,[34] is amended by adding immediately after chapter 215 the following new chapter:

"Chapter 216.—SPECIAL GRAND JURY

"§ 3331. Summoning and term

"(a) In addition to such other grand juries as shall be called from time to time, each district court which is located in a judicial district containing more than four million inhabitants or in which the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then serving. The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

"(b) If a district court within any judicial circuit fails to extend the term of a special grand jury or enters an order for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury, upon the affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

"§ 3332. Powers and duties

"(a) It shall be the duty of each such grand jury impaneled within any judicial district to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district. Such alleged offenses may be brought to the attention of the grand jury by the court or by any attorney appearing on behalf

34. 18 U.S.C.A. §§ 3331 to 3334.

of the United States for the presentation of evidence. Any such attorney receiving information concerning such an alleged offense from any other person shall, if requested by such other person, inform the grand jury of such alleged offense, the identity of such other person, and such attorney's action or recommendation.

"(b) Whenever the district court determines that the volume of business of the special grand jury exceeds the capacity of the grand jury to discharge its obligations, the district court may order an additional special grand jury for that district to be impaneled.

"§ 3333. Reports

"(a) A special grand jury impaneled by any district court, with the concurrence of a majority of its members, may, upon completion of its original term, or each extension thereof, submit to the court a report—

"(1) concerning noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action; or

"(2) regarding organized crime conditions in the district.

"(b) The court to which such report is submitted shall examine it and the minutes of the special grand jury and, except as otherwise provided in subsections (c) and (d) of this section, shall make an order accepting and filing such report as a public record only if the court is satisfied that it complies with the provisions of subsection (a) of this section and that—

"(1) the report is based upon facts revealed in the course of an investigation authorized by subsection (a) of section 3332 and is supported by the preponderance of the evidence; and

"(2) when the report is submitted pursuant to paragraph (1) of subsection (a) of this section, each person named therein and any reasonable number of witnesses in his behalf as designated by him to the foreman of the grand jury were afforded an opportunity to testify before the grand jury prior to the filing of such report, and when the report is submitted pursuant to paragraph (2) of subsection (a) of this section, it is not critical of an identified person.

"(c) (1) An order accepting a report pursuant to paragraph (1) of subsection (a) of this section and the report shall be sealed by the court and shall not be filed as a public record or be subject to subpena or otherwise made public (i) until at least thirty-one days after a copy of the order and report are served upon each public officer or employee named therein and an answer has been filed or the time for filing an answer has expired, or (ii) if an appeal is taken, until all rights of review of the public officer or employee named therein have expired or terminated in an order accepting the report. No order accepting a report pursuant to paragraph (1) of subsection (a) of this section shall be entered until thirty days after the delivery of such report to the public officer or body pursuant to paragraph (3) of subsection (c) of this section. The court may issue

such orders as it shall deem appropriate to prevent unauthorized publication of a report. Unauthorized publication may be punished as contempt of the court.

"(2) Such public officer or employee may file with the clerk a verified answer to such a report not later than twenty days after service of the order and report upon him. Upon a showing of good cause, the court may grant such public officer or employee an extension of time within which to file such answer and may authorize such limited publication of the report as may be necessary to prepare such answer. Such an answer shall plainly and concisely state the facts and law constituting the defense of the public officer or employee to the charges in said report, and, except for those parts thereof which the court determines to have been inserted scandalously, prejudiciously, or unnecessarily, such answer shall become an appendix to the report.

"(3) Upon the expiration of the time set forth in paragraph (1) of subsection (c) of this section, the United States attorney shall deliver a true copy of such report, and the appendix, if any, for appropriate action to each public officer or body having jurisdiction, responsibility, or authority over each public officer or employee named in the report.

"(d) Upon the submission of a report pursuant to subsection (a) of this section, if the court finds that the filing of such report as a public record may prejudice fair consideration of a pending criminal matter, it shall order such report sealed and such report shall not be subject to subpena or public inspection during the pendency of such criminal matter, except upon order of the court.

"(e) Whenever the court to which a report is submitted pursuant to paragraph (1) of subsection (a) of this section is not satisfied that the report complies with the provisions of subsection (b) of this section, it may direct that additional testimony be taken before the same grand jury, or it shall make an order sealing such report, and it shall not be filed as a public record or be subject to subpena or otherwise made public until the provisions of subsection (b) of this section are met. A special grand jury term may be extended by the district court beyond thirty-six months in order that such additional testimony may be taken or the provisions of subsection (b) of this section may be met.

"(f) As used in this section, 'public officer or employee' means any officer or employee of the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any political subdivision, or any department, agency, or instrumentality thereof.

"§ 3334. General provisions

"The provisions of chapter 215, title 18, United States Code, and the Federal Rules of Criminal Procedure applicable to regular grand juries shall apply to special grand juries to the extent not inconsistent with sections 3331, 3332, or 3333 of this chapter."

(b) The part analysis of part II, title 18, United States Code, is amended by adding immediately after

"215. Grand Jury ..... 3221"

the following new item:

"216. Special Grand Jury ..... 3331."

Sec. 102. (a) Subsection (a), section 3500, chapter 223, title 18, United States Code, is amended by striking "to an agent of the Government" following "the defendant".

(b) Subsection (d), section 3500, chapter 223, title 18, United States Code, is amended by striking "paragraph" following "the court under" and inserting in lieu thereof "subsection".

(c) Paragraph (1), subsection (e), section 3500, chapter 223, title 18, United States Code, is amended by striking the "or" following the semicolon.

(d) Paragraph (2), subsection (e), section 3500, chapter 223, title 18, United States Code, is amended by striking "to an agent of the Government" after "said witness" and by striking the period at the end thereof and inserting in lieu thereof: "; or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.".

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellant, :

-against- : No. 74-1446

BERNHARD FEIN, :

Appellee. :

----------x

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

The undersigned being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age and resides at 2310 Creston Avenue, Bronx, New York.

That on the 8th day of July, 1974 deponent served the annexed Brief for Appellee on the United States Attorney

the annexed Brief for Appellee on the United States Attorn
for the Eastern District of New York (Att: Paul B. Bergman
Esq.), attorney for Appellant in this action, at 225 Cadma
Plaza East, Brooklyn, New York, the address designated by
said attorney for that purpose by depositing two copies of
same enclosed in a postpaid properly addressed wrapper, in
official depository under the exclusive care and custody
the United States Postal Service within the State of New

Betty Verdejo

Sworn to before me, this
8th day of July, 1974.

Marlene Connor

MARLENE CONNOR, Notary Public
State of New York, No. 03-5789465
Qualified in Bronx County
Commission Expires March 30, 1976

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of

York.

INDIVIDUAL VERIFICATION

STATE OF NEW YORK, COUNTY OF ss.:

, being duly sworn, deposes and says that deponent is the in the within action; that deponent has read the foregoing and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19 .....

CORPORATE VERIFICATION

STATE OF NEW YORK, COUNTY OF ss.:

, being duly sworn, deposes and says that deponent is the of the corporation named in the within action; that deponent has read the foregoing and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because is a corporation. Deponent is an officer thereof, to-wit, its

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19 .....

CERTIFICATION BY ATTORNEY

STATE OF NEW YORK, COUNTY OF

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated: .....

ATTORNEY'S AFFIRMATION

STATE OF NEW YORK, COUNTY OF

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is

the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: .....

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within
upon attorney(s) for
in this action, at
the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States post office department within the State of New York.
Sworn to before me, this day of 19

.....

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 at No.
deponent served the within
upon
the herein. by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.
Sworn to before me, this day of 19

.....

NOTICE OF ENTRY

Sir : PLEASE TAKE NOTICE that the within is a true-certified-copy of a

duly entered in the office of the clerk of the within named court

on 19

Dated: 19

Yours, etc.,

RABINOWITZ, BOUDIN & STANDARD

Attorneys for

Office and Post Office Address
30 EAST 42ND STREET
NEW YORK, N. Y. 10017

To:

Attorney for

NOTICE OF SETTLEMENT

Sir : PLEASE TAKE NOTICE that

of which the within is a true copy will be presented for settlement to Mr. Justice

one of the Justices of the within named Court at

on the day of 19

at M.

Dated: 19

Yours, etc.,

RABINOWITZ, BOUDIN & STANDARD

Attorneys for

Office and Post Office Address
30 EAST 42ND STREET
NEW YORK, N. Y. 10017

To: Esq .

Attorney for

Index No. 74-1446 19

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

-against-

BERNHARD FEIN,

Appellee.

AFFIDAVIT OF SERVICE BY MAIL

RABINOWITZ, BOUDIN & STANDARD

Attorneys for Appellee

Office and Post Office Address
30 EAST 42ND STREET
NEW YORK, N. Y. 10017
OXFORD 7-8640

To: Esq .

Attorney for

Service of a copy of the within

is hereby admitted:

Dated, N.Y., 19

Attorney for

BLACKSTONE STATIONERS, INC. 585 MERRICK RD. LYNBROOK, N. Y.